United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2079

To be argued by
PAULA VAN METER

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-2079

UNITED STATES OF AMERICA ex rel.
JOSEPH EDWARD FRANCIS LUNZ,

Petitioner-Appellant,

- against -

J. E. LaVALLEE, SUPERINTENDENT
CLINTON CORRECTIONAL FACILITY
DANNEMORA, NEW YORK

Respondent-Appellee.

BRIEF FOR PETITIONER-APPELLANT

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STATEMENT OF THE CASE

PRELIMINARY STATEMENT

Petitioner-appellant, Joseph Lunz, appeals pursuant to 28 U.S.C. §2253, from the Order of the United States District Court for the Eastern District of New York (Neaher, J.) dated March 26, 1975 (R. 23)* denying his application for writ of habeas corpus made pursuant to 28 U.S.C. §2241 et seq.

On April 14, 1975, the District Court granted Petitioner's pro se motion for certificate of probable cause and for leave to proceed on appeal in forma pauperis (R. 28). By Order dated May 21, 1975, this Court appointed Paula Van Meter, Esq. to represent Petitioner in his appeal to this Court.

Petitioner entered a plea of guilty to second degree murder for which he was sentenced to a term of twenty years to life imprisonment. Petitioner is presently serving that term. Petitioner asserts that his guilty plea was neither

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* References to "R" are to the Record on Appeal. The number immediately following "R" refers to the document number; where appropriate, reference to a particular page of a document or to an exhibit annexed to a document will be indicated by a hyphen followed by the page number or exhibit letter. Copies of the District Court's Opinion and the docket entries are also included in the Appendix.

competently nor voluntarily made. He further asserts that he was denied the effective assistance of counsel throughout the state court proceedings, through the time of entering his guilty plea, and that he was deprived of his right to speak on his own behalf at the time of his sentencing. Each of these allegations asserts a constitutional violation sufficient to warrant vacation of Petitioner's conviction, and none received full treatment by the District Court (Order 1-12*). Minimally, each of these allegations necessitates full factual development. Since no full hearing has yet been held, either in the state or federal courts, on the issues of the voluntariness of the plea and deprivation of the right to participate in the sentencing hearing there has never been an opportunity to develop and prove these allegations.

PROCEDURAL HISTORY

Petitioner was indicted for the crime of murder in the first degree and was thereafter arraigned and a plea of not guilty entered on February 1, 1965. Petitioner's pleading was changed and a guilty plea entered to murder in the second degree on June 7, 1965, upon which he was later sentenced to a term of twenty years to life imprisonment (Shapiro, J.). This judgment of conviction was affirmed, 29 A.D.2d 631 (1967), and leave to appeal to the New York Court of Appeals denied.

Petitioner made application for a writ of error

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*"Order" followed by a number refers to the District Court Memorandum Order, dated March 26, 1975, from which this appeal is taken.

coram nobis, which application was denied on April 25, 1972 (Buschman, J.). Upon reapplication for coram nobis relief an evidentiary hearing was granted on the question of inadequate representation by counsel, after which relief was again denied on June 13, 1973 (CN. Feb. 1-75; CN. March 1-29*). Leave to appeal the coram nobis denial was denied to both the Appellate Division, Second Department, and the New York Court of Appeals.

On January 28, 1974, Petitioner filed application for a writ of habeas corpus in the Eastern District of New York which was denied by Order dated March 26, 1975 (Neaher, J.). Petitioner moved for reargument on his habeas corpus application which motion was denied as untimely by Order dated April 22, 1975 (Neaher, J.).

On April 14, 1975, a certificate of probable cause and leave to appeal to this Court was issued on the basis of the substantial nature of Petitioner's claims (R. 28).

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*"CN. Feb." followed by a number refers to the minutes and page therein of the Coram Nobis Hearing held on February 16, 1973; "CN. March" followed by a number refers to the minutes and page therein of the adjourned Coram Nobis Hearing held on March 2, 1973.

STATEMENT OF FACTS

In February of 1964 Petitioner suffered a fractured skull and cerebral concussion for which he was hospitalized both at the time and subsequently for recurring symptoms. During this time Petitioner was arrested for the crime of grand larceny, and in connection therewith sent to Kings County Hospital for psychiatric evaluation.

On or about December 1, 1964, while a patient at Kings County Hospital, Petitioner was interrogated by two police detectives concerning the stabbing death of a building superintendent in Queens (CN. Feb. 8-10). Petitioner had been questioned about the murder on a previous occasion by one of the same detectives, Patrick Fitzsimmons (CN. Feb. 5,6). On both occasions Petitioner denied all knowledge of and involvement in the crime (CN. Feb. 5-10). During the second interrogation session, held at the psychiatric hospital, Detective Fitzsimmons exerted pressure upon the Petitioner to confess to the murder by promising immunity from prosecution (CN. Feb. 9).

On the following day, while Petitioner was still a patient in the psychiatric hospital, Detective Fitzsimmons returned and again promised Petitioner that if he confessed to the murder he would not be prosecuted for that crime (CN. Feb. 11, 12). Petitioner requested an opportunity to speak with his attorney but was refused (CN. Feb. 12). On this occasion Detective Fitzsimmons also promised that he would attempt to arrange transfer of Petitioner to the hospital of

his choice (CN. Feb. 12). In reliance upon these promises, Petitioner made a verbal statement of confession which was tape recorded (CN. Feb. 12). Later that same day Petitioner recanted this confession, denied all involvement with the murder and refused to sign a written statement of confession (CN. Feb. 13).

Petitioner's taped confession was played to James Mannion who was alleged therein to have been an accomplice to the murder. Mannion subsequently made a corroborative statement upon which an indictment for murder in the first degree, dated February 1, 1965, was issued against both Mannion and Petitioner. On February 10, 1965 James F. McArdle, Esq. and James P. McGratten, Esq. were appointed as counsel to represent Petitioner in connection with the murder charge.

On February 17, 1965, pursuant to order of Hon. Joseph M. Conroy, Petitioner was again sent to Kings County Hospital for a psychiatric examination to determine his competency to understand the charges against him. The report issued from this examination confirmed that Petitioner was disturbed in several respects but concluded that he was capable of understanding the charges against him and able to assist in his defense (CN. Feb. exhibit 3). On April 2, 1965, a hearing was held on the psychiatric findings, resulting in concurrence by the court with the reported findings.

Prior to this hearing, Petitioner had not been visited by his attorneys nor did he have any personal communication with them (Application for Writ of Error Coram Nobis, Exhibits I, II and III). Following the hearing Petitioner was visited once by Mr. McArdle who urged him to enter a guilty plea to murder in the second degree (CN. Feb. 23). Petitioner was urged to plead to the lesser offense on the basis of the risk of execution attendant with the first degree murder charge. To this end Messrs. McArdle and McGratten met with Petitioner's sister and urged her to exert her influence on Petitioner to plead guilty to the lesser charge of murder in the second degree and thereby avoid this risk to his life. On June 7, 1965 Petitioner's sister, who was then in the advanced stages of pregnancy, met with Petitioner. She entreated him to save his life by entering the plea (CN. Feb. 25-28). Immediately after this meeting and as a result of this urging from both his sister and attorneys, Petitioner appeared before Hon. Irwin J. Shapiro and entered a plea of guilty to second degree murder. Through this time Detective Fitzsimmons had never withdrawn his promise of immunity from prosecution.

On August 23, 1965 Petitioner appeared before Justice Shapiro for sentencing. It was clear in that proceeding that Petitioner did not comprehend the nature of the proceeding (SH. 1-4*). As soon as the Judge commenced

* "SH." followed by a number refers to the sentencing hearing transcript and page therein, part of the record herein.

imposing sentence, Petitioner registered his complete surprise by interruptions, expletives and general disruptive conduct (SH. 3, 4). Up to this point Petitioner believed that he would not be 'prosecuted', i.e. sentenced to jail, for the murder charge. Petitioner requested an opportunity to speak at this sentencing hearing but was refused, and is currently serving the prison sentence imposed.

SUMMARY OF ARGUMENT

I. Petitioner's guilty plea was not made voluntarily and was the product of misunderstanding and coercion. Petitioner was promised immunity from prosecution in return for cooperation and a confession. He was pressured by his attorneys and family to render such cooperation, to which he ultimately complied in entering the guilty plea. Petitioner was in an emotionally unbalanced condition at the time and never comprehended the consequences of the plea. Because the plea was neither competently nor voluntarily made it is void and the resulting conviction and sentence invalid.

II. Petitioner was denied the effective assistance of counsel at all stages of the state proceeding through the time of entering his plea. He was never visited by his attorneys until the day of his first court proceeding. They failed to confer and consult with Petitioner resulting in his complete lack of comprehension of the nature and consequences of his guilty plea.

III. Petitioner was denied the right to speak in his own behalf at the time of his sentencing. This is a right protected under both the common law and statutory law of New York, and is remedied by vacating the sentence thus illegally imposed.

ARGUMENT

I. PETITIONER'S PLEA OF GUILTY WAS NOT MADE VOLUNTARILY AND WAS BASED UPON MISUNDERSTANDING OF ITS CONSEQUENCES AND IS THEREFORE VOID.

In order for a guilty plea to be valid and consistent with the guarantee of due process and protection against self-incrimination of the Fifth and Fourteenth Amendments to the United States Constitution it must be both voluntary and intelligent, entered with awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742 (1970), Kerchval v. United States, 274 U.S. 220 (1927). A guilty plea which is induced by threats or promises is deprived of its voluntary character and is therefore void. Machriboda v. United States, 368 U.S. 487 (1962). A guilty plea is not only a confession but also a conviction. It acts as a waiver of the right to trial, and as such waiver of constitutional right must be done with full appreciation of the consequences. McMann v. Richardson, 397 U.S. 759 (1970), Johnson v. Zerbst, 304 U.S. 458 (1938).

Petitioner's guilty plea lacked all of these requisite elements for constitutional validity. It was the direct product of an illegally obtained confession, and the

promise of immunity of the police coupled with the urgings of counsel and emotional entreaties of family. Petitioner, having been found to be psychologically and emotionally unstable, was incapable of making a truly intelligent waiver at the time of the plea. This factor coupled with the compulsion and immunity promise necessarily precluded truly voluntary action. See Malloy v. Hogan, 378 U.S. 1 (1963). This fact is underscored by Petitioner's repeated claims of innocence made both before and after entry of the guilty plea. Similarly, Petitioner did not comprehend the consequences of entering the guilty plea as proven by his demonstration of surprise and frustration at the Sentencing Hearing (SH. 3). It is of no consequence that Petitioner testified at the Plea Hearing that he understood the nature and consequences of his actions in entering the guilty plea (PH. 4-7*) since his psychological condition and words and actions all indicated to the contrary. Furthermore, truly informed legal action is dependent upon adequate advice from counsel. Hamilton v. Alabama, 368 U.S. 52 (1961). Such legal counsel was lacking in this case as discussed under Point II herein.

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* "PH" followed by a number refers to the transcript of the hearing at which Petitioner entered his guilty plea and page therein, part of the record herein.

The fact that Petitioner's guilty pl a was not entered voluntarily and made without full comprehension renders the plea void necessitating vacation of the conviction and sentence based thereon. In the alternative, at the very minimum, the question of voluntariness and scienter raises substantial questions of fact entitling Petitioner to a full evidentiary hearing. Walker v. Johnston, 312 U.S. 275 (1941).

II. PETITIONER WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner's court appointed attorneys failed to fully investigate the case and to communicate with Petitioner and thereby rendered inadequate, ineffective representation. Neither of the two appointed attorneys, James McArdle and James McGratten, ever met or consulted with Petitioner between the date of their appointment, February 10, 1965, and the date of Petitioner's sanity hearing, April 2, 1965 (CN. Feb. 16; Application for Writ of Error Coram Nobis, Exhibits I, II, III and VI). As a result, no proof or expert testimony was offered in support of Petitioner's position at this hearing. In addition, the at-

torneys never explained to Petitioner the nature or consequences of the prosecutorial process. Petitioner was never relieved of the misconception that he was not being nor would be prosecuted for the murder (CN. Feb. 26). Both Messrs. McArdle and McGratten urged Peititioner to enter the guilty plea but never explained its consequences, as evidenced by Petitioner's shocked reaction to his sentencing hearing (S.H. 3). Such lack of communication precluded competence and voluntariness of the plea and is inadequate to satisfy the constitutional guarantee of representation by counsel.

The effective assistance of counsel is a defendant's most fundamental right because it affects his ability to assert any other right he may have. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

Any determination of whether effective assistance has been rendered must be made on a case by case basis, but some guidelines have been judicially furnished. When the first meeting between a lawyer and his client occurs within a day of the trial or court proceeding there may be a presumption of inadequate legal representation in the absence of showing of lack of prejudice. Stokes v. Peyton, 437 F. 2d 131 (4th Cir. 1970). A fundamental duty which counsel owes his client is the obligation to confer and consult so

as to ascertain potential defenses and discuss strategies. United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). Peitioner's counsel made their introductory contact to the case on the day of Petitioner's sanity hearing and never succeeded in effectively communicating with Petitioner, resulting in the substantial prejudice to Petitioner of his involuntary guilty plea.

On the basis of these factors this Court should make a finding of inadequate representation by counsel. The District Court erred in holding that the question could not be reviewed because of the state court evidentiary hearing previously held (Order 8, 9). Since the record of that state court hearing does not support the finding of adequate representation, this Court may overrule such finding pursuant to 28 U.S.C. §2254(d)(8). Furthermore, the District Court bases its findings on "the extensive experience and standing" of Petitioner's assigned counsel. (Order 9) Petitioner does not contest the eminent reputation of either attorney, but complains that the performance upon which it rests did not extend to his case. As the Fourth Circuit has observed, "The best advice obtainable is worth little if it is not based upon a thorough knowledge of the facts of the case . . . ." Edgerton v. State of North Carolina, 315 F.2d 676 (4th Cir. 1963).

III. PETITIONER WAS DEPRIVED A FUNDAMENTAL RIGHT WHEN HE WAS DENIED THE RIGHT TO SPEAK IN HIS OWN BEHALF AT THE TIME OF SENTENCING.

Under New York law a defendant has the right to speak in his own behalf at the time of judgment and sentencing. This is a fundamental right long recognized in the common law of New York, Messner v. People, 45 N.Y. 1 (1871), and now recognized statutorily, Code Crim. Proc. §480; CPL §380.50. The failure to grant this right of allocution can be the basis of a petition for habeas corpus, People ex rel. Emmanuel v. McMann, 7 N.Y.2d 342 (1960) or a motion to vacate sentence, People ex. rel. Miller v. Martin, 1 N.Y.2d 406 (1956).

Petitioner was never asked if he wished to speak in his own behalf at the time of sentencing (SH. 3). He attempted five times to request information and make a statement and was silenced on each occasion:

"THE COURT: ... there may be some possibility of rehabilitation after he serves his sentence.

THE DEFENDANT: What do you mean "sentence"?

THE COURT: All right. The sentence of the Court --

THE DEFENDANT: Wait a minute. Sentence for what? What are you, serious?

THE COURT: Just keep still.

THE DEFENDANT: What do you mean "keep still"? Now I get sentenced in Manhattan court. I don't get sentenced here.

THE COURT: Sentence of the Court --

THE DEFENDANT: What do you mean "sentence of the Court"?

THE COURT: Sentence of the Court --

THE DEFENDANT: Get the fuck out of here.

(A scuffle then ensued between the defendant and court officers.)" (SH. 3)

It is clear that Petitioner was startled by the fact that sentence was being imposed. He was still of the belief that he was not to be prosecuted or sentenced, due to the promise of Detective Fitzsimmons, and reacted with justifiable shock and indignation.

The District Court decision dismisses this point, at page 7 of the decision, by citation to authority for the position that such a claim may not be raised on collateral attack. Hill v. United States, 368 U.S. 424 (1962); Bowen v. Johnston, 306 U.S. 19 (1939). These cases are not applicable, however, because they deal with federal court sentencing procedures handled pursuant to federal procedural rules. Petitioner's case involves error committed by the state court under its procedure which mandates that the defendant be given an opportunity to speak at the time of sentencing, Code Crim. Proc. §480. Such error may be attacked by writ of habeas corpus. People ex rel. Emmanuel v. McMann, supra.

CONCLUSION

For each of the reasons stated, the findings of the District Court and its Order denying Peititioner's application should be reversed with a direction for the writ of habeas corpus to issue. In the alternative, the substantial questions raised herein should be remanded to the District Court for a full hearing thereon.

Dated: New York, New York
June 16, 1975

Respectfully submitted,

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APPENDIX

CC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. JOSEPH EDWARD FRANCIS LUNZ,

Petitioner,

-against-

J. E. LA VALLEE, Warden,

Respondent.

74 C 177

MEMORANDUM ORDER

Petitioner pro se seeks a writ of habeas corpus, 28 U.S.C. §§2241, et seq., alleging his imprisonment resulted from constitutionally invalid State court proceedings. Petitioner pleaded guilty to murder in the second degree on June 7, 1965, and was sentenced on August 23, 1965 to a term of imprisonment of from twenty years to life. He is presently serving that sentence at the Auburn Correctional Facility.

Petitioner asserts that his plea was obtained through the coercive tactics of his court-appointed attorney, who, among other things, convinced petitioner's pregnant sister to implore petitioner to plead guilty. Additionally,

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petitioner claims he was denied permission to speak at his sentencing and was denied the effective assistance of counsel throughout the State court proceedings.

Two of these contentions were raised before the State courts in two separate applications for writs of error coram nobis. The first such application focused on the voluntariness of the plea and was denied by Justice Irwin Shapiro in February 1970. The second application, directed at the competency of counsel, was denied, after an evidentiary hearing, by Justice Albert Buschmann in June 1973.

I.

Petitioner asserts that in September 1964, he was arrested on a grand larceny charge and on December 1, 1964, committed to the Kings County Hospital for psychiatric examination. While at the Kings County Hospital, petitioner was interrogated by two detectives concerning the stabbing death of a building superintendent in Queens. The detectives allegedly told petitioner that they knew he was responsible for the homicide, that he should confess in order to allow them to close the case, and that he would not be prosecuted. Petitioner then requested, but was denied, access to counsel.

At first petitioner refused to confess but on the second day of questioning petitioner made an oral confession which was tape-recorded. He subsequently recanted this oral confession and refused to sign a written confession.

The detectives used the oral confession to elicit a confession from one James Mannion, petitioner's alleged co-conspirator. Based on Mannion's statements both he and petitioner were indicted for first-degree murder.

Attorneys James F. McArdle and James P. McGrattan were assigned as counsel to represent petitioner. Petitioner claims they advised him to plead guilty because of the strength of the State's case. Petitioner initially refused to do so but finally, on June 7, 1965, did agree to plead guilty. On that date petitioner was brought before Justice Shapiro for pleading. Waiting in court for petitioner was his sister Helen, who was then in the advanced stages of pregnancy. His sister had been summoned there by petitioner's assigned counsel for the express purpose of inducing petitioner to plead guilty to second degree murder. Justice Shapiro granted defense counsel's request to allow petitioner to speak with his sister. According to petitioner, his sister became quite

agitated and upset when petitioner told her that he would not plead guilty to second degree murder; she begged him to do so, fearing he would be executed if found guilty after trial. Not wishing to risk impairing his sister's health, particularly in view of the pregnancy, petitioner acquiesced and pleaded guilty.

Petitioner now asserts that under the totality of the circumstances his guilty plea cannot be considered to have been voluntarily made, relying on United States ex rel. Brown v. La Vallee, 301 F. Supp. 1245 (S.D.N.Y. 1969). The district court in Brown granted a writ of habeas corpus after finding Brown had insisted for 10 months that he would prevail at trial on the theory of self defense but was finally overcome by the urgings of his assigned counsel and his mother. Immediately after he had entered a plea of guilty, Brown attempted, unsuccessfully, to withdraw that plea.

That the Brown case resembles this case is of no help to petitioner here. On appeal the lower court decision was reversed, United States ex rel. Brown v. La Vallee, 424 F.2d 457 (2 Cir. 1970), the court stating:

> "To say that Brown's will was overborne is an unrealistic assessment of his situation. If his will is defined as a predetermination to contest his guilt, certainly this was overcome; the proposition is self-evident, for almost every claim that a plea was coerced involves an initial determination not to plead guilty. Indeed, almost every guilty plea is preceded by a plea of not guilty. When, however, Brown's will is assayed at the time he had reached a reasoned assessment of all the factors militating for and against a plea, it is apparent that his decision was a free and rational choice.
>
> "Certainly, this was a difficult, even a traumatic, decision, but we are not prepared to say in the totality of the circumstances that it was not the product of a rational assessment of the situation, based on the relevant consideration advanced by those who had petitioner's welfare at heart." 424 F.2d at 460-61.

This language is particularly apposite here. Petitioner had already given a verbal confession to the two detectives and petitioner's co-conspirator, Mannion, had also confessed. With his life at stake, it certainly cannot be said under the circumstances that petitioner's choice was not free and rational or that it was "coerced" because prompted by advice received from those who stressed the risk involved in any other decision. See North Carolina v. Alford, 400 U.S. 25, 31 (1970).

Nor does petitioner's assertion that he was assured by the two detectives he would not be prosecuted alter the voluntary character of his plea. As the minutes of his plea reveal, he could not at that time have been in doubt that he was going to prison:

> "THE COURT: In other words, you say now to the Court that you desire to withdraw your plea of not guilty and plead guilty to the crime of murder in the second degree?
>
> "DEFENDANT LUNZ: Yes, sir.
>
> "THE COURT: You realize under that plea, if I accept it, that the penalty will be not less than twenty years. It may be more than twenty years and not less than life. You understand that?
>
> "DEFENDANT LUNZ: Yes, sir.
>
> "THE COURT: The law also requires me to tell you that if you have previously been convicted of a felony, the sentence in this case must be increased by reason of that fact. Do you understand that?
>
> "DEFENDANT LUNZ: Yes, sir.
>
> "THE COURT: Has anybody made you any promise? Judge McGratten, Mr. McArdle, the District Attorney or anybody else made you any promise as to what my sentence in this case will be if I accept the plea?
>
> "DEFENDANT LUNZ: No, sir.
>
> "THE COURT: You have had no talk with me until just now, is that right?
>
> "DEFENDANT LUNZ: That's right.

"THE COURT: And that's here in open court, is that right?

"DEFENDANT LUNZ: Yes." (Minutes of Plea, p. 4) (emphasis supplied.)

Justice Shapiro then asked petitioner to relate, in his own words, what transpired on the date of the alleged homicide. After petitioner recounted how he had stabbed the building superintendent with a letter opener after being caught in the act of robbing the building, Justice Shapiro asked:

"THE COURT: Now, knowing everything that I have told you and knowing what the sentence may very well be and that the minimum, at any rate, is not less than twenty years, do you still say you desire to withdraw your plea of not guilty and plead guilty to the crime of murder in the second degree?

"DEFENDANT LUNZ: Yes, sir." (Minutes of Plea, p. 7.)[1]

II.

Petitioner's second claim that he was not permitted to address the sentencing court when he was sentenced may not be raised on collateral attack. Hill v. United States, 368 U.S. 424, 428 (1962):

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' Bowen v. Johnston, 306 U.S. 19, 27."

Moreover, it appears from the transcript of the sentencing that petitioner was not afforded the opportunity to speak because of his own contemptuous conduct.

III.

Petitioner's claim of incompetency of counsel is based on assertions that assigned counsel did not properly inform themselves concerning the facts of his case and consequently overlooked a viable insanity defense. Petitioner's Traverse at 5. As noted above, this claim was presented in a second coram nobis application made by petitioner in June 1973. In denying the application after an evidentiary hearing, Justice Buschmann's decision quotes Justice Shapiro's description of the extensive experience and standing of

petitioner's two assigned counsel[2] as the basis for his own conclusion that they were "experienced and well known in their field." Contrary to petitioner's contention — renewed here — Justice Buschmann also found that

> "[b]oth counsel clearly recognized the possibility of this defense [insanity]. A sanity hearing was held; the issue litigated and the Court found petitioner competent to stand trial. . . . An attorney must act on the facts presently before him and, in this case, assigned counsel had to balance the merits of an uncertain defense against the real dangers of capital punishment. Under the circumstances, a negotiated plea could not be deemed an abandonment of the defendant's interests but rather a valid courtroom representation." Opinion of Justice Buschmann dated June 13, 1973 at 4.

The justice's ultimate conclusion was that

> "taking all the facts of this case into consideration and evaluating the credible testimony of the witness in this hearing, this Court finds that this is not 'one of those rare cases in which the representation of a defendant by his assigned counsel was so inadequate and ineffective as to deprive him of a fair trial.' (People v. Bennett, supra, p. 464.)" Id.

Neither petitioner's application nor the record of proceedings in the State court brings this case within any of the exceptions of 28 U.S.C. §2254(d). He has merely restated the same claim which was the subject of the evidentiary hearing before Justice Buschmann. No federal

evidentiary hearing is therefore required. See Townsend v. Sain, 372 U.S. 293, 318 (1963).

Although not bound to accept the legal conclusions drawn from facts established at a State court evidentiary hearing concerning the competency of counsel, United States ex rel. Radich v. Criminal Court of City of New York, 459 F.2d 745, 748 (2 Cir. 1972), this court agrees with Justice Buschmann that petitioner has failed to establish that counsel was so ineffective as to render his State court proceedings a farce and a mockery. United States v. Currier, 405 F.2d 1039, 1043 (2 Cir.), cert. denied, 395 U.S. 914 (1969); United States v. Wright, 176 F.2d 376, 379 (2 Cir.), cert. denied, 338 U.S. 956 (1950).

Accordingly, the application for a writ of habeas corpus is denied and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the respondent and against the petitioner dismissing the petition.

The Clerk is further directed to forward a copy of

this memorandum order to the petitioner, and to the Attorney General of the State of New York, Attention Burton Herman, Esq., Assistant Attorney General.

Edward R. Neaher

U. S. D. J.

Dated: Brooklyn, New York
March 26, 1975

FOOTNOTES

[1] In addition to the factual deficiency of petitioner's claim, his assertion of a "no-prosecution" promise by the detectives is legally insufficient. A defendant must have reasonable grounds for assuming that the promisor has the authority to make sentencing promises. United States v. Frontero, 452 F.2d 406, 411 (5 Cir. 1971); United States v. Antoine, 434 F.2d 930, 931 (2 Cir. 1970). "[A]dvice and persuasion, not amounting to threats, by a person not an officer of the court could, even if proved, never establish the sort of compulsion that would invalidate a plea entered with full understanding of the consequences." Id.

[2] "In the matter at hand the Court appointed two members of the bar in good standing, experienced and well known in their field. As Mr. Justice Shapiro pointed out in his coram nobis decision of February 19, 1970 in discussing the qualifications of these attorneys (page 2):

> "'Mr. McGrattan has been an assistant district attorney for more than 20 years, has prosecuted a great number of important cases in the former County Court of this County and has served as a County Court judge for a period of time. Mr. McArdle for the past 20 years has been engaged to a great extent in representing defendants in criminal cases and has tried a number of important cases during that period and bears an excellent reputation as a trial lawyer.'" Opinion of Justice Buschmann dated June 13, 1973, at 3.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA
ex rel. JOSEPH EDWARD FRANCIS LUNZ

vs.

R. J. HENDERSON

74-C-177

(HABEAS CORPUS)

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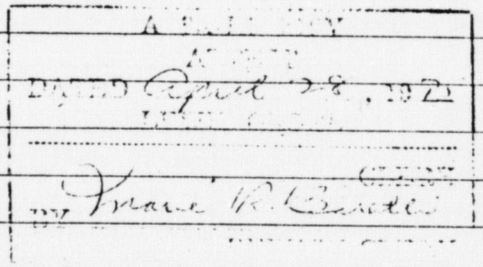
74-C-177 U.S.A. ex rel. JOSEPH EDWARD FRANCIS LUNZ vs. J.E. LaVALLEE, WARD

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
1-31-74	PETITION FILED FOR A WRIT OF HABEAS CORPUS.	1
1-31-74	Copy of letter of Clerk of Court filed dated Jan. 31, 1974 acknowledging application, etc.	2
2-19-74	Letter of relator herein filed dated Feb. 12,1974 addressed to the Clerk's office, etc. re appearance in court, etc.	3
2-25-74	Affidavit of relator herein filed together with letter dated Feb. 20, 1974, etc.	4 & 5
3-25-74	"Summary Judgment of Default filed together a letter from relator herein dated March 19, 1974, etc.	6 & 7
4-12-74	Copy of letter of Clerk of Court filed dated April 12, 1974 addressed to relator herein; Letter of Joseph Lunz filed dated April 9, 1974, etc.	8 & 9
4-16-74	Letter of relator herein filed re change of address, etc.	10
4-18-74	Letter of relator herein filed dated April 16, 1974 re change to be made from J.E.LaVallee, to J. W. PATTERSON, respondent, etc.	11
5-17-74	BY NEAHER, J. ORDER TO SHOW CAUSE FILED (1) The Atty.,Gen., State of N.Y., to show cause by the filing of a return to the petition, why a writ of habeas corpus should not be issued, etc. (See Order) ~~dated May 13, 1974~~	12
5-17-74	Copy of letter of Clerk of Court filed dated May 17, 1974 re enclosure of a copy of order to show cause, etc.	13
5- 20-74	Letter of relator herein filed dated May 15, 1974 re change of address, etc.	14
5-20-74	Letter of relator herein filed dated May 17, 1974 that his letter be treated as a motion for assignment of counsel, etc.	15
5-20-74	Letter of relator herein filed dated May 17, 1974 addressed to Clerk re his transfer , etc.	16
6-7-74	Affidavit of Joseph Edward Francis Lunz filed re service, etc. together with "SUMMARY JUDGMENT OF DEFAULT"	17 & 18
6-10-74	Affidavit of Burton Herman, Assistant Atty., Gen., filed in opposition, etc.	19
6-25-74	TRAVERSE FILED and letter of relator herein re said Traverse, dated June 21, 1974, etc.	20 & 21
7-8-74	Amending traverse to respondent's affidavit in opposition filed.	22
3-26-75	BY NEAHER, J. MEMORANDUM ORDER FILED. The application for a writ, etc. is DENIED; Clerk to enter judgment in favor of respondent and against the petitioner DISMISSING the petition. Clerk is directed to forward copies, etc. (See Memo., etc.)	23

CIVIL DOCKET

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		
		PLAINTIFF	DEFENDANT	
3-26-75	Copy of letter of Clerk of Court filed dated March 26,1975 addressed to relator herein re enclosure of a copy of memo., etc., cc: Atty.,Gen., State of N.Y.			2
2-26-75	JUDGMENT FILED. ORDERED and ADJUDGED that the petitioner take nothing and that the petition is DISMISSED.			2
4-7-75	NOTICE OF APPEAL FILED.			2
4-7-75	Application filed for a Certificate of Probable Cause.			2
4-14-75	BY NEAHER, J. MEMORANDUM ORDER FILED. A certificate of probable cause will issue. SO ORDERED. Clerk of Court is directed to forward a copy of memo., etc., to petitioner and to the Atty.,Gen., State of N.Y. (See Memo.,etc.)			2
4-14-75	Copy of letter of Clerk of Court filed dated April 14, 1975 re enclosure of a copy of memo., etc.			
4-14-75	Affidavit of relator herein filed and motion to reargue and to withdraw the application for a certificate of probable cause, e			
4-23-75	BY NEAHER, J. MEMORANDUM ORDER FILED. ORDERED that the reargument is DENIED. SO ORDERED. Clerk is directed to forward a copy of memo., to petitioner and to the Atty.Gen., State of N.Y. (See order Dated April 22,1975)			3
4-23-75	Copy of letter of Clerk of Court filed dated April 23, 1975 re enclosure of a copy of memo., etc., cc: Atty., Gen.,State of N.Y.			3



D. C. 110

DOCKET

TITLE OF CASE

UNITED STATES OF AMERICA
ex rel. JOSEPH EDWARD FRANCIS LUNZ

VS.

~~J. E. LaVALLEE, WARDEN~~
~~J. W. PATTERSON~~ (pursuant to letter)
R. J. HENDERSON (pursuant to letter dated 5-15-74)

ATTORNEYS

For Plaintiff: (address to:

Joseph Edward Francis Lunz
~~BOX 1019~~ Pro
~~DANNEMORA, N.Y.~~
For Defendant: Auburn, N.Y. 13022

BASIS OF ACTION:

JURY TRIAL CLAIMED
ON

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBU
1-31-74	FORMA PAUPERIS	0	0							

ABSTRACT OF COSTS

TO WHOM DUE	AMOUNT	

RECEIPTS, REMARKS, ETC.

CLERK'S CERTIFICATE

MAY 14 1975

75-2079

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
ex rel. JOSEPH EDWARD FRANCIS LUNZ

vs.

R.J. HENDERSON

74-C-177

I, LEWIS ORGEL, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing CERTIFIED copy of the Docket Entries from A to C and the original papers numbered from page 1 to 33 (supp. d. Annex. #32) constitute the Record on Appeal.

I further testify that the last day to file said record is MAY 15, 1975.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed, at the Borough of Brooklyn in the Eastern District of New York, this 28th day of April in the year of our LORD, One Thousand Nine Hundred and SEVENTY-FIFTH and of the Independence of the United States One Hundred and NINETY-NINTH.

Lewis Orgel
LEWIS ORGEL
CLERK

By: Marie R. Baretti
MARIE R. BARETTI
DEPUTY CLERK

COPY RECEIVED this 11th day of June, 1975

Burton Kramer, MD